IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 510 of 1977

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LAKSHMINARAYAN RAMNIWAS

Versus

BOARD OF TRUSTEES OF THE PORT OF KANDLA

Appearance:

MR JR NANAVATI for Appellant

MR SR BRAHMBHATT for Respondent

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 25/07/2000

ORAL JUDGEMENT

The plaintiff sued the defendant- firm to recover Rs. 20422-64 in Special Civil Suit No. 7/66 filed in the Court of Civil Judge (SD) Kutchh at Bhuj on following brief facts:

Prior to 29.2.1964 Kandla Port was administered by Government of India.On 29.2.1964 Kandla Port Trust came into being as Corporation constituted under Major Ports Trusts Act, 1963 (for short 'the Act'). It succeeded to assets and liabilities of the Port Administration under sec. 29 of the Act,that is how the suit has been filed by the successor plaintiff in that capacity. It has been asserted that order for supply of 760.00 Tons of imported steel was issued in favour of defendant by Iron and Steel Controller, Government of India, Ministry of Steel, Mines and Heavy Engineering (Department of Iron and Steel), Calcutta, against Kandla Port Organisation indent no. 15-S(4)/56-57, dated 28.4.1956 and 1.5.56 forwarded to the defendant as per letter No. 15-S(4)/56-57 dated 5.5.1956. The goods were despatched to Kandla Port Trust under Bill of Lading No. S.27494 dated 22.7.1956 Ex.S.S. Jaltarang and the despatch documents were sent through the State Bank of India, for payment. The documents were retired upon payment to the Bank while also paying the Bank charges in the sum of Rs. 220.95ps. It was noticed that against invoice No. 56/DC/K/886 dated 6.8.1956, the total amount payable worked out to be Rs. 1,23,812-69ps,while the total of the invoice given by the defendant and paid by the plaintiff through the Bank was Rs. 1,53,812-69ps, the difference being Rs. 30,000/ between the amount actually due and the amount billed and paid.

Upon repeated requests for excess recovery of Rs. 30,000/, the defendant vide letter No. IRC/58-59/2213 dated 15.9.1958 sent a statement of charges incurred by the defendant on transportation, incidental charges by shipment and insurance premium, in all Rs. 20,201-69ps and sent the cheque for the balance amount of Rs. 9,798-31ps. It was stated in the letter that Rs. 30,000/ were claimed as advance towards transport charges, removal charges etc. but the invoice No. 56/DC/K/886 dated 6.8.1956 did not mention anything about such advance and therefore, it was totalled by Rs. 30,000/ more. In this respect, it has been the plaintiff's case that the charges stated in letter dated 15.9.58 were not payable in terms of release order issued by Iron and Steel Controller and, therefore, the matter was referred to the said authority for clarification and asking the firm to refund the balance amount of Rs. 20201-69ps as per letter dated 14.10.1958. After a lot of correspondence between the defendant and the Iron and Steel Controller as also the Kandla Port Trust Authority, the Iron and Steel Controller communicated its decision as per letter dated 26.5.1965 directing the defendant to refund the charges recovered by them for following

items:-

I. "Removal charges from Jetty to Godown consequent detention charges @ 2% on the C.I.F. value of the material as above forwarding charges for despatch of materials ex-godown to jetty.

II. Since the materials were despatched out of Bombay before six months after arrival of material at Bombay Town the elements of Town Duty is refundable under the Bombay Municipal Rules and consequently the same is not recoverable from the consignee.

III. However, the suppliers were entitled to claim actual Port charges incurred by them for export of materials to Kandla by Steamer and the actual Insurance charges, if any.

IV. The Bank Commission charges amounting to Rs. 220-95ps were also held refundable."

In view of the aforesaid decision, the plaintiff has asserted that the following amounts are refundable by the defendant as having been wrongfully recovered in excess of the correct charges:

i) Amount due from the wrong claim of Rs. 30000/ minus Rs. 9798-31 refunded by them. Rs. 20,201-69 ps.

ii) Bank commission charges incurred while releasing the documents from the Firm. Rs. 220-95 ps.

Rs. 20,422-64 ps.

It has been asserted that against the said amount, the defendant would be truly entitled to port charges incurred by the defendant in shipments of materials to Kandla by Steamer and actual insurance charges paid by the defendant, if any, the details whereof were not furnished.

In view of the aforesaid facts, the plaintiff addressed notice dated 13.12.1965 to the defendant. The plaintiff has asserted that the reply given to the said notice on 31.12.1965 was not correct and the claim was wrongfully denied therein. Under such circumstances, setting out how the suit was filed within the period of

limitation, the plaintiff claimed aforesaid amount from the defendant.

The defendant resisted the suit as per the written statement ex. 12. While denying the allegations contained in plaint, the defendant mainly contended that the suit was not maintainable, that the suit was barred by law of limitation, the suit was barred by principle of Estoppel, Acquiescence and waiver, that it suffered from the vice of non-joinder of the party, that there was no privity of contract between the parties, and that the plaintiff was not entitled to claim the amount.

Upon assertion of the following facts, it has been alleged that as per the discussions with the Stores Officer Incharge, who had been to Calcutta, an agreement was arrived at for the despatch of the goods in question by a steamer by which all the booking,handling and forwarding charges for despatching the goods by Steamer were to be borne by the consignee, the plaintiff. The plaintiff was liable to pay the said amount as soon as the defendant submitted his bill supported by the bills of his clearing agents and that the said consignee was to make 100 percent payment coupled with the aforesaid charges against the bills of Lading drawn through the Bank. In pursuance of the said agreement, the goods in question were despatched by the steamers as detailed in para-8 of the written statement and shipping documents along with the defendant's bills for the consignments were sent to the said consignee (plaintiff) through the Bank for payment and the amount of Rs. 30,000/ was mentioned as advance towards booking, handling, and forwarding charges. On receipt of the defendant's letter dated 15.9.58, which enclosed statement of charges for Rs. 20,201/69ps and the cheque for the balance amount of Rs. 9798-31ps., the plaintiff, by its letter dated 14.10.58 asked the defendant to issue a fresh cheque for the said amount in favour of financial adviser and Chief Accounts Officer, Kandla Port Project, inter alia stating that the Development Commissioner had no account with the concerned Bank. The defendant, accordingly, vide its letter dated 25.10.58 sent another cheque for the said amount for which a due receipt was issued by the plaintiff. Thus, since the amount was received without any protest or reservation, the plaintiff's suit is stated to be barred by principle of estoppel and waiver. It has been asserted that the plaintiff would thus be estopped from reopening the issue and to claim the refund of the amount of Rs. 20201-69ps. It is the case of the defendant that the plaintiff failed or neglected to place order giving despatch instructions as soon as the goods

arrived. The plaintiff having thereafter asked the defendant for delivery of the goods in question by way of despatch by out going steamer to Kandla Port and having agreed to pay and bear all the charges incurred by the defendant with regard to the goods in question, the plaintiff cannot withdraw from his obligation to pay and re-imburse the charges. It has been asserted that the plaintiff was liable to pay additional and extra service charge incurred for the despatch of the goods by out going steamer to Kandla. The defendant has made a reference to the release order dated 17.18-4-1956 issued by the Iron and Steel Controller in this respect. Under such circumstances, the defendant claimed dismissal of the suit. The trial court being the learned Civil Judge (SD) Kutchh at Bhuj, had an occasion to deal with the matter. Following issues were framed at ex. 34.

1. Whether the suit is maintainable in the present form ?

2. Whether the plaint is properly signed and verified ?

3. Whether this court has jurisdiction to hear the suit ?

4. Whether the suit is in time ?

5. Whether the suit is barred by estoppel, acquiescence and waiver ?

6. Whether the plaintiff is entitled to bring the suit ?

7. Whether the plaintiff proves that there was privity of contract between him and the defendant?

8. Whether the decision of the Iron and Steel Controller contained in his letter dated 26.5.1965 is final and binding to the defendant ?

9. Whether plaintiff proves that it is entitled to refund of Rs. 20,201-69ps. ?

10. Whether the plaintiff is entitled to interest of the amount found due from the defendant ? If yes, at what rate ?

11. What order ?

Dealing with the issues in the light of the evidence adduced before the trial court, the trial court answered issues nos. 6,8,10 & 11 in favour of the plaintiff holding that issue no. 4 did not survive in view of the decision of the High court in FA No. 84/69 and holding that the suit was not barred by estoppel, acquience and waiver.The trial court accordingly decreed the suit as per the impugned judgment and decree dated 24.12.1976, as aforesaid. The defendant has challenged the same in this First Appeal before this Court.

I have heard learned counsels appearing for the rival parties.

Mr AR Thakkar, learned counsel appearing for the appellant (defendant) canvassed vice of estoppel and waiver once again before this Court. He also challenged the decree on the ground that the plaintiff was liable to pay all the charges including handling, transportation and other charges. He made reference in that respect to the correspondence placed on record of the suit. It would first be appropriate to deal with the question of waiver once again pressed into service in this appeal.

The factual aspects concerning the defence of waiver is stated hereinabove. Mr Thakkar made reference to letter ex. 64 (ex. 108) dated 15.9.58 addressed by the defendant to the plaintiff. According to this letter, the defendant sought to forward with it a statement of plaintiff's account to the defendant as on 31.5.58 in respect of supply of 540.4084 of M.S. Round Bars shipped from Bombay and as per the statement Rs. 9798.31ps remained to the credit of the plaintiff with the defendant. The defendant, therefore, sought to forward the cheque for the amount of Rs. 9798.31ps to the plaintiff. On making reference to the statement, it would appear that there are details regarding advance of Rs.30,000/ adjusted towards certain charges; such charges are Port charges for removing the goods in question from Docks to the defendant's Godown on account of non-availability of shipping space, transport charges for conveying the goods from defendant's godown to the Docks and Port, incidental charges for shipment of the goods in question as per Iron and Steel Controller's fixed rate of incidental charges at the time of imports operations and insurance premium as per actuals. The respective amounts of such charges have been set out on the debit side and balance of Rs. 9798-50ps has been struck in favour of the plaintiff. Mr Thakkar referred to the reply to this letter given by the plaintiff to the defendant on

14.10.1958; that appears at ex. 98. It is true that the plaintiff called for fresh cheque as paticularised in the reply. It is also true that as per letter dated 25.10.58 appearing at ex. 99, the defendant sought acknowledgment and receipt of the fresh cheque issued by the defendant. It is also true that as per ex. 100 dated 2.2.60 receipt was sent in respect of the cheque. However, it is difficult to find that this course of conduct as reflected by the defendant's letter ex. 108, ex. 99 and plaintiff's letter ex. 100, the plaintiff waived its claim of excess recovery by the defendant. It might be noted that the defendant itself came out with the case as per the letter ex. 64 (108) that there was an excess payment made by the plaintiff to the defendant and the same amount was lying by way of credit with the defendant. IN order to set out the working of that account, the defendant noted the charges which the defendant deducted from the advance payment of Rs. 30,000/. What the plaintiff has done is to accept the cheque in the first instance without going into the correctness or otherwise of the details set out in the statement of account. Even according to the receipt ex. 100, the plaintiff has not come out with a statement that the cheque was received in full and final settlement or that even if there was any further excess amount left out with the defendant, it was to be foregone or given up. The conduct on the part of the plaintiff, does not even indicate that the plaintiff intended to waive any excess amount. It was not within the contemplation of the plaintiff then that some more amount was left out with the defendant. The correspondence would indicate that excess amount lying with the defendant was first noticed by the defendant itself. It is in this connection that the trial court has made reference to the evidence of defendant's witness ex. 115 where it has very clearly admitted that advance of Rs. 30,000/ mentioned in the statement of account was a typographical mistake and it was a wrong total. The trial court has also referred to the other admissions of the said witness which would go to indicate that there can hardly be any conduct on the part of the plaintiff to forego or waive further excess amount that in fact remained with the defendant. Mr Thakar made a reference to the decision of Hon'ble Supreme Court in the case of Lala Kapurchand Godha & Ors., vs. Mir Nawab Himayatalikhan Azamjah, reported in AIR 1963 SC p 250. In that case, the defendant had executed in 1937 a promissory note in favour of the plaintiff for a sum of 13 lacs and odd rupees due on account of purchase of jewellary. After the Military occupation of Hyderabad, the Princes Debt Settlement Committee set up by the Military Governor decided that

the plaintiffs should be paid a sum of Rs. 20 lacs in full satisfaction of his claim of Rs. 27 lacs under the note. The Government also made it clear that unless full satisfaction was recorded payment would not be made. After some protest the plaintiffs agreed to accept the sum of Rs. 20 lacs in full satisfaction of his claim and duly discharged the promissory note by endorsement of full satisfaction and received the payment. He then brought a suit against the defendant for recovery of the balance of Rs. 7 lacs. IN the back ground of such facts, the Apex Court held that the case was completely covered by Sec. 63 of the Contract Act and illustration (c) thereof and the plaintiffs having accepted payment from a third person in full satisfaction of plaintiffs' claim, they were not entitled to sue the defendant for the balance in view of sec. 41 of the said Act. In my considered opinion, this decision refers to principle of satisfaction and accord as contemplated by the aforesaid provisions of the Contract Act. It can hardly be applied to the facts pressed into service by the defendant for claiming the defence of waiver in the present suit. As a matter of fact, waiver would imply knowledge of existence of payment of excess amount at the time when some or remaining amount has been accepted by the concerned party. In fact, the plaintiff did not have at the relevant point of time particulars with regard to further excess amount remaining with the defendant. Therefore, there was no question of waiving or foregoing such amount at all at the relevant point of time. In that view of the matter, the conclusion reached by the trial court on the question of estoppel and waiver can hardly be said to be erroneous. The submission made by the learned counsel for the appellant in that respect, therefore, cannot be accepted.

Then there is an effort on the part of the learned counsel for the appellant justifying the amount which remained with the defendant and claimed by the plaintiff as an excess amount still lying with the defendant. In this connection, Mr Thakkar made reference to the correspondence placed on the record of the suit. Ex. 62 is the letter dated 17/18-4.1956 addressed by Mr L.K. Bose on behalf of the Iron and Steel Controller, Government of India, Ministry of Commerce & Industry, Calcutta. It is addressed to the Development Commissioner, Port Project, Kandla. It is in respect of supply of material against outstanding orders/demands. Mr Thakkar referred to clause-3 (3rd part) of the letter,which would read as under:

"The imported steel will be supplied by the importer on arrival ex-jetty at Col.I rate ruling at the time of delivery and all charges for transporting the materials from Jetty to destination will be borne by the consignee. When the consignee wishes the materials to be booked by rail/steamer, the same will be booked freight to pay. Such arrangement should be made with the importer direct and if any demurrage is incurred at the port due to non-allotment of wagons, the consignee will have to pay the same."

From the aforesaid clause in the communication ex. 62, it has been submitted that consignee (plaintiff) was liable to pay freight, demurrage and transportation charges from Jetty to destination. Pausing for a moment here, reference to this communication has been made by Mr. Thakkar for showing that the plaintiff would be liable to all other charges and not only the charges referred to in the aforesaid clause, since there was a delay on the part of the plaintiff in requisitioning the goods that has already been arrived at Bombay Port. That is precisely not the gist of this clause.

Then there is a reference made to ex. 63, letter dated 5.5.1956 addressed by the Stores Officer Incharge, Development Commissioner, Kandla to the defendant. It is inter alia recited in the letter that the materials (goods in question) might be despatched by one of the steamers touching Kandla Port under clear Bill of Lading, payment of which would be made in full immediately on receipt of the same together with proof of despatch and necessary Test Certificates as stated in para-3 of the communication dated 17/18-4-1956 (ex.62). It might be noted from the aforesaid communication that the plaintiff has neither expressly nor impliedly agreed to pay any charges other then those mentioned in ex. 62.

Then there is a letter ex. 95 dated 28.5.1956 written by the defendant to the plaintiff. Reference is made to supply of the goods in question (760 tons of M.S. Round Bars). In reply to the letter dated 5.5.1956, the defendant has agreed to despatch the materials from the port of Bombay by steamer provided that all the booking, handling and forwarding charges for despatching the goods by steamer from Bombay to Kandla would be to the plaintiff's account. The plaintiff, in reply dated 28.5.1956 ex. 96 confirmed to pay said charges. Then there is a letter ex. 97 dated 2.7.1956 addressed to Mr. Jain of the defendant complaining of non-despatch of the goods in time. It might be noted

from this communication that there was no delay on the part of the plaintiff in requisitioning the goods in question from the defendant. It is in this background that further correspondence and the evidence placed on record has to be assessed. The aforesaid communications are followed by the order of Iron and Steel Controller dated 25.10.1956, the price/rate of the goods in question having been fixed ex-Jetty. As per the order of supply of 760 tons of Steel issued by the Iron and Steel Controller in favour of the defendant as importer against the indent of the plaintiff, 540.5 of steel was despatched by the defendant by the Steamer S.S. Jaltarang and the documents were sent through the State Bank of India, Gandhidham Branch for the payment to enable the delivery of the goods. The total invoice amount was Rs. 1,53,812-69ps , whereas the actual amount worked out was Rs. 1,23,812=69ps. Now this is not in dispute. Thus, there was a difference of Rs. 30,000/ by way of excess amount charged, in all probability through mistake. This was then known to the defendant, but not to the plaintiff. As stated above, the defendant in realisation of the mistake addressed a letter dated 15.9.1958 ex. 64 sending therewith a cheque for the amount which was not for the exact difference, but for less amount i.e. Rs. 9,798-31ps., while debiting certain charges. In fact, Rs. 30,000/ were claimed by way of advance towards the transport charges and other charges as per the release order. There has been a long drawn correspondence between the parties at a later point of time resulting into the passing of the order by the Steel Authority directing the defendant to refund the excess amount to the plaintiff. All that has been dealt with and discussed by the trial court. The trial court has proceeded to consider even the question whether defendant could rightfully debit the aforesaid charges while sending the excess amount only of Rs. 9798-31ps. In that process, the trial could noticed that the claim of advance was based on the bill of Kanji Jadavji & Co., who happened to be defendant's clearing agent at Bombay. His bill ex. 82 related to the despatch of the goods by all the three steamers. The plaintiff's case was that the goods in question were despatched by the steamer S.S. Jaltarang to the extent of 211 tons vide invoice ex. 74. That has not been challenged by the defendant. Reference has been made to the vouchers, but no vouchers were produced by the defendant, although the defendant was under the duty to justify the claim by producing the vouchers. No one was examined from Kanji Jadavji & Co., the Clearing Agent to prove the bill in the context of the particulars set out therein. The trial court, therefore, found that the charges mentioned in the bills

couldn't be proved by the evidence which was available to the defendant. That apart, the evidence of defendant's witness ex.115 revealed that advance of Rs. 30,000/ shown in the statement of account ex. 65 was a typographical mistake suggesting that the claim of Rs. 30,000/ was wrongly made in the bill ex. 65 sent by the defendant along with the reply ex. 64 dated 15.9.58. Witness also admitted that Iron and Steel Controller directed the defendant to refund the said amount to the plaintiff. He admitted that the defendant charged for all the consignments and not for any forwarding charges in all the bills. Assessing the evidence as a whole in the context of the release order, the trial court has come to the conclusion that the defendant was not entitled to claim handling, forwarding and booking charges for the despatch of the goods. Referring once again to the evidence of the defendant, the trial court has noticed the admission to the effect that the Iron and Steel Controller has sought explanation of the defendant about charging of Rs. 20,000/ and odd for forwarding, removal and incidental charges. No reply was given to the said show-cause notice. The witness also admitted that by ex. 76 the Iron and Steel Controller ordered the defendant to refund the said amount to the plaintiff. The defendant did not re-act to such direction on the part of the said authority. It has appeared from the evidence that the defendant removed the goods in question from Jetty to Godown without prior permission of the Iron and Steel Controller. In this connection, the witness admitted when his attention was drawn to the letter ex. 84 that ex-facto permission was asked by the defendant from the Iron and Steel Controller, but it was not granted by the said authority to the defendant and instead the said authority directed the defendant to charge ex-jetty price. The trial court, therefore, came to the conclusion that the defendant has removed the goods in question from Port to Godown without the permission of the aforesaid authority and then sought to charge the same from the plaintiff. That was found quite contrary to the direction of the authority. Pausing for a moment here, it might be noted that the defendant was conscious about the directions from the Iron and Steel Controller (aforesaid authority) and that is the reason why the defendant made efforts to refund some amount while debiting certain charges which also could not have been debited. It has been placed on record and it has appeared in the evidence that the defendant, as an importer was to charge only Rs. 12.50ps per Ton as extra charge for removal from Jetty to Godown. In this regard, the aforesaid evidence of the defendant he admitted when his attention was drawn to ex. 107, that the defendant

had not preferred any bill ex. 107. He also admitted that there was no order from Iron and Steel Controller to charge the advance. All these documents clearly show that the amount of Rs. 30,000/ was improperly inserted by the defendant in the statement of account ex. 65. It has appeared in the evidence that the defendant charged the above incidental and other charges for the transport of the goods from Jetty to Godown and again Godown to Jetty and according to the admission of the witness himself there could not be any such agreement between the parties for claiming such charges. In my opinion, the conclusion of the trial court that the claim of Rs. 30,000/ as advance for booking, forwarding and handling of goods in question was quite wrong and incorrect is unassailable. Besides, the decision of the Iron and Steel Controller as per his letter dated 26.5.1965 was final and binding to the defendant. That letter has been placed at ex. 76 and the defendant's witness ex. 115 has clearly admitted that Iron and Steel Controller was the authority whose directions were to be obeyed.

In view of what is stated hereinabove, the submissions of Mr. Thakkar learned counsel for the appellant to the effect that the appellant truly and rightfully debited the aforesaid charges cannot be accepted.

The appeal would therefore, deserve to be dismissed. Having heard the learned counsels for the parties in respect of cost and having regard to the fact that excess amount charged by the defendant came to light on account of defendant's own initiation and action, it would be just and proper that the parties are directed to bear their own costs in so far as this appeal is concerned. It is accordingly dismissed with no order as to costs.

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mandora/